MOTION FILED
FEB 28 1983

No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States (the "Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari,[1] and in support of its motion states:

1. The Chamber is the nation's largest federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions, with an aggregate membership in excess of 235,000. Its

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[1] This motion is necessitated by the failure of the respondent to consent to the filing of the brief; the petitioners have given their consent.

members represent a broad spectrum of business and professional groups, both large and small.

2. One of the Chamber's principal functions is to present its members' views to this Court and the lower federal courts on public issues of concern to the business community, including matters of antitrust law.[2]

3. The issue in this case regarding the intra-enterprise conspiracy doctrine is one of significance and concern to the entire business community. The decision below is merely the most recent in a confusing array of decisions in which courts have struggled to define when a parent corporation's interaction with its wholly-owned subsidiary violates Section 1 of the Sherman Act. The substantial inconsistencies and conflicts among these lower court decisions, and the uncertainty they create, impose substantial costs on the business community by unreasonably interfering with commercial planning decisions. Companies commonly choose to operate through subsidiaries rather than unincorporated divisions to: (a) maximize tax liabilities; (b) accommodate differing personnel policies within a single corporate family; (c) improve management accountability; (d) permit the owners of small companies who sell their businesses to larger companies to retain an interest in their companies; (e) enhance attractive financing of different segments of a business; (f) comply with regulatory policies (*e.g.* requirements for separating banking and investment companies); and (g) cure foreign investment problems by encouraging the participation of foreign shareholders. The consequences of incorporating subsidiaries, as demonstrated by the numerous court decisions based on the intra-enterprise conspiracy doctrine, provide ample support of the need for the Chamber to present its views, on behalf of its membership.

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[2] *E.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981); *Weyerhaeuser Co. et al.* v. *Lyman Lamb Co., et al.*, 81-1618, 81-1619, —— U.S. ——, 102 S.Ct. 2232 (May 17, 1982).

4. Because imposition of the intra-corporate conspiracy doctrine exalts form over substance, Supreme Court review and repudiation of the doctrine will enhance both economic efficiency and the overall administration of the antitrust laws.

WHEREFORE, the Chamber respectfully requests that its motion be granted.

Respectfully submitted,

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February 28, 1983

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
REASONS FOR GRANTING THE WRIT	1
I. Review By This Court Is Sorely Needed To Cure The Confusion Created By Previous Decisions Of This Court And The Courts Below	3
II. The Intra-Enterprise Conspiracy Doctrine Serves No Legitimate Antitrust Enforcement Purpose	6
III. The Doctrine Creates Inefficiencies And Unnecessarily Constrains Business Planning	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Aaron E. Levine & Co. v. *Calkraft Paper Co.*, 429 F.Supp. 1039 (E.D. Mich. 1976) 5

Harvey v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979) 5

H&B Equipment Co. v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978) 6

Joseph E. Seagram & Sons Inc. v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 6

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 3, 4

Perma-Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1968) 3, 4, 6

Thomsen v. *Western Electric Co.*, 512 F.Supp. 128 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 348 (1982) 5

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951) 3, 4

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947) 3, 4, 6

William Inglis & Sons Baking Co. v. *ITT Continental Banking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 57 (1982) 7

Windsor Theater Co. v. *Walbrook Amusement Co.*, 94 F.Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951) 5

Articles:

M. Handler & T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981) 2, 4, 5

McQuade, *Conspiracy, Multicorporate Enterprise and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183 (1955) 3

Note, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy*, 14 Duq. L. Rev. 63 (1975) 3

TABLE OF AUTHORITIES—Continued

Page

Note, *Conspiring Entities Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982) 2, 5

Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20 (1968) 2, 3

Statutes:

Section 1 of the Sherman Act ..... *passim*

Section 2 of the Sherman Act 6, 7

Section 7 of the Clayton Act 6, 7

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States (the "Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File a Brief *Amicus Curiae*, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

The intra-enterprise conspiracy doctrine,[1] as construed by the court below, has no relationship to the economic and

[1] This *amicus curiae* brief is limited to the question of the capability of a parent corporation to conspire with its wholly-owned subsidiary in violation of the Sherman Act. Moreover, it expresses no opinion as to the liability of the Petitioners under state tort law, which is not raised in the petition.

policy concerns underlying the antitrust laws. The issue is squarely presented by the record below, since the jury expressly found that the only parties to the alleged conspiracy in restraint of trade were Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company ("Petitioners") (Pet. App. at A-6). Thus, the relevant facts concerning this aspect of the case are not in dispute, and absent the intra-enterprise conspiracy doctrine, there would have been no antitrust judgment against the Petitioners.

In the Chamber's view, the intra-enterprise conspiracy doctrine, which developed from broad language in previous decisions of this Court, is characterized by a lack of both sound analysis and antitrust policy consideration. In the lower courts, in particular, application of the doctrine has devolved into a confusing proliferation of inconsistent standards and alternative formulations. This confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability. *See*, Motion Seeking Leave to File this brief, paragraph 3.

The intra-enterprise doctrine has been roundly criticized by Professor Milton Handler, a well-known authority in antitrust law. Indeed, Professor Handler has described the doctrine as a "weird concept," and advocated that it should be repudiated by this Court. Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 25-6 (1981). Professor Handler is not alone. The doctrine has been criticized by other commentators. *See*, Note, *Conspiring Entities Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 667-68 (1982) ("it is inconsistent with antitrust goals to make section 1 liability turn on the firm's choice of organizational form."); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N. Y. U. L. Rev. 20, 21 (1968) ("the net result is

thoroughgoing uncertainty . . . leaving no one able to point with confidence to the location of the boundary between legal and illegal business conduct."); Note, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy*, 14 Duq. L. Rev. 63, 65 (1975) (doctrine is based on "conflicting rationales" with "its scope unclear" and generally "in a state of flux"); McQuade, *Conspiracy, Multicorporate Enterprise, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183 (1955) ("the implication . . . may be that the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units.").

Accordingly, for these reasons, as well as those set forth below, the Chamber respectfully urges this Court to reexamine and repudiate the intra-enterprise conspiracy doctrine which adds nothing of substance to antitrust enforcement, while unnecessarily constraining business options.

I. Review By This Court Is Sorely Needed To Cure the Confusion Created by Previous Decisions of This Court and the Courts Below.

The intra-enterprise conspiracy doctrine is neither rooted in legislation nor established through articulated analyses of antitrust policy and economic consideration. Section 1 of the Sherman Act (Pet. at 2) is silent on the issue of capacity to conspire, while the four decisions of this Court,[2] which are the foundation of the doctrine, provide only sweeping dicta with a minimum of analytical content.

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[2] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968).

In the seminal case of *United States* v. *Yellow Cab*, 332 U.S. 218 (1947), the Court was faced with a series of acquisition agreements which brought a substantial share of the taxicabs in several major cities under common control. Noting that "the [corporate] affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete," the Court refused to permit the fact of close corporate integration to shield the controlling interests from the consequences of its aggregate power. *Id.* at 229. Unfortunately, the Court also proclaimed broadly that "a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Id.* at 227.

While the sweeping language of *Yellow Cab* could have been read to mean only that monopoly power can arise as readily from single firm market power, cognizable under Section 2, as from cartelization, cognizable under Section 1, in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), Justice Black elevated the *Yellow Cab* dictum to a broad new "rule," stating that "common ownership and control does not liberate corporations from the impact of the antitrust laws." *Id.* at 215. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951), and *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), simply reiterated this rule with no attempt at further analysis.

In the absence of an articulated policy rationale, lower courts have attempted to formulate alternative standards for limiting the potential sweep of the Court's broad language, resulting in what has been described as a "progeny of confused and mischievous adjudications." M. Handler & T. Smart, *supra* at 26. While the First, Third and Fifth Circuits follow the dicta literally, the Second, Seventh, Eighth and Ninth Circuits have advanced vari-

ous approaches for narrowing the intra-enterprise conspiracy concept. These limiting doctrines, however, including the sole decisionmaker rule,[3] the nonrestraint of outsider trade rule,[4] and the no holding out of independent competitors rule,[5] make little more economic policy sense than the basic doctrine.[6] Indeed, in the decision below, the Seventh Circuit affirmed an "all factors" test, which merely cast the jury adrift to "consider all of the facts . . . that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other" (Pet. App. at A-47).

In summary, the intra-enterprise conspiracy doctrine is derived solely from overbroad dicta without regard to antitrust policy or economic justification. Because of this lack of analytical content, application of the doctrine in the lower courts has become increasingly confused and arbitrary and tends to distort other aspects of antitrust enforcement. As one commentator has noted, the "current disagreement among the circuits . . . demands resolution by the Supreme Court," *Conspiring Entities Under Section 1 of the Sherman Act*, *supra* at 681.

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[3] *See, Windsor Theater Co.* v. *Walbrook Amusement Co.*, 94 F.Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

[4] *See, e.g., Thomsen* v. *Western Elec. Co.*, 512 F.Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 348 (1982).

[5] *See, e.g., Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F.Supp. 1039, 1045 (E.D. Mich. 1976).

[6] It has been suggested that the lower courts' attempts to limit the application of the intra-enterprise conspiracy doctrine reveal their discomfort with a doctrine that has the capacity to interfere with normal parent-subsidiary relations. M. Handler & T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 38 & 54 (1981). See also p. 7 *infra*.

II. The Intra-Enterprise Conspiracy Doctrine Serves No Legitimate Antitrust Enforcement Purpose.

In sharp contrast to the rampant confusion concerning the capacity of affiliated corporations to conspire, the courts uniformly agree that an unincorporated division is not a separate entity capable of conspiring with its parent corporation for purposes of Section 1 of the Sherman Act.[7] Since, as the court below recognized (Pet. App. at A-9), "there may be little [practical] difference between a wholly-owned subsidiary and a fully integrated division," the intra-enterprise conspiracy doctrine results in arbitrary and economically irrational imposition of antitrust liability based solely on the formality of a subsidiary, as opposed to divisional, corporate structure.[8]

In the Chamber's view, well-developed antitrust principles under Section 2 of the Sherman Act and Section 7 of the Clayton Act already provide ample tools for dealing with market power and competitive behavior of constituent corporate entities under common control. Un-

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[7] *See, e.g., H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[8] In *Perma Life*, the Court implicity recognized the formalistic dichotomy between the treatment of subsidiaries and divisions, but suggested that "since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities" (392 U.S. at 141-42). The Court's opinion, however, made no attempt to articulate any antitrust policy or economic justification to support such a distinction, nor to reconcile such differential treatment with the admonition in *Yellow Cab* that the Sherman Act "*is aimed at substance rather than form*." 332 U.S. at 227. (Emphasis added.) Instead, the opinion went on to stress that alternative theories of conspiracy were also present, thereby suggesting that the intra-enterprise conspiracy holding was unnecessary on the facts presented.

der such analysis, the mere fact of separate incorporation cannot shield the acquisition of exercise of market power from antitrust accountability. By the same token, however, when aggregate market power under common control is below established Section 2 or Section 7 thresholds, it makes no sense to impose a stricter standard under Section 1 of the Sherman Act merely because that limited power is administered through subsidiaries rather than corporate divisions. Antitrust enforcement can only lose credibility if it is applied formalistically and without consideration of actual economic effects.

Equally important, the sense of unfairness surrounding the intra-enterprise conspiracy doctrine may also distort other antitrust principles. As several courts have already recognized, a special standard for finding conspiracy must obtain in parent-subsidiary situations since "the typically close relationship between the parent and subsidiary could too easily give rise to inferences of conspiratorial activity. Antitrust laws should not deter legitimate consultation between a holding company and its subsidiary with regard to financial planning or the establishment of lawful economic goals to be pursued by the subsidiary." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 57 (1982). The Chamber believes that such efforts to construct new "conspiracy" or "restraint of trade" principles to offset the pernicious effects of the intra-enterprise conspiracy doctrine only compound its harms.

III. The Doctrine Creates Inefficiencies And Unnecessarily Constrains Business Planning.

The sharp conflicts among the circuits in dealing with intra-enterprise conspiracies has created substantial confusion and uncertainty in the business community. Corporations with subsidiaries operating in various parts of the country cannot reasonably anticipate which of the dis-

parate judicial approaches might be applied to their particular circumstances. Such uncertainty increases business risk, which in turn imposes unnecessary costs on the economy. The elimination of this confusion is itself sufficient reason for this Court to repudiate the intra-enterprise conspiracy doctrine and to reconcile the arbitrary discrimination between divisions, and subsidiaries in antitrust matters.

The choice between organizing constituent corporate entities as separately incorporated subsidiaries, rather than divisions, is not purely formal from the standpoint of economic efficiency. For the small businessman and individual entrepreneur, in particular, availability of the option to organize as a subsidiary, rather than in a divisional format, may be critically important. In order to tap broader resources and to realize financial rewards from the creation of a new business, the entrepreneur often seeks to be acquired by a larger established corporation. One favored method to maximize the interests of each party to such a transaction is to permit the original owner to remain active in management and to retain a direct, minority interest in the business. Only a separately incorporated subsidiary can provide the necessary flexibility to achieve these purposes.

Finally, as discussed *supra* at 7, the intra-enterprise conspiracy doctrine jeopardizes normal parent-subsidiary relations once a subsidiary format has been adopted. In the Chamber's view, a parent corporation should not be limited in exploiting legitimate efficiencies of integration within the corporate family. It is both reasonable and desirable for the controlling corporations to coordinate the marketing and pricing policies of its subsidiaries in order to maximize the organization's overall competitive efforts. Such operational economies should not be discouraged by intra-enterprise antitrust risks which serve no antitrust purpose.

CONCLUSION

In summary, the goals of economic efficiency which antitrust policy seeks to preserve, can only be enhanced by this Court's review and repudiation of the formalistic discrimination created by the much criticized intra-enterprise conspiracy doctrine. That doctrine adds nothing of substance to antitrust enforcement and, instead, unnecessarily and uneconomically constrains business options.

The Chamber of Commerce respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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